IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 535 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SATTARBHAI ALIBHAI PATNI

Versus

STATE OF GUJARAT

Appearance:

MR NAVIN K PAHWA for the Petitioner.

Mr. L.B.Dabhi, ASSTT.GOVERNMENT PLEADER for Respondents No. 1-2

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 13/02/2002

ORAL JUDGEMENT

By means of this petition, the petitioner has sought for quashing and setting aside the impugned order dated 13.1.1999 passed by the respondent no. 2 Director of Municipalities, Ahmedabad whereby the petitioner has been removed from the office of councillor of Dhoraji Municipality.

2. The petitioner was elected as a councillor of Dhoraji Municipality. This petition has been filed on the allegation that he was elected as a councillor of the municipality and is functioning as a councillor with effect from 3.1.1996. The petitioner was also elected as a Chairman of the Transport Committee of the Municipality. On account of consecutive five public holidays in April 1998, the municipality was closed consecutively for five days from 8.4.1998 onwards. The petitioner being the Chairman of the Transport Committee was informed that the vehicles attending emergency duty, like ambulance, water pumping department, vehicles looking after street lights etc. needed diesel and an amount of Rs.75000/- was outstanding towards diesel bill and so diesel pump operators had stopped giving diesel to the municipality on credit. Therefore, the diesel in vehicles was required to be purchased by cash only. The petitioner had informed the President that the diesel in the vehicles attending emergency duties was required to be purchased and for that purpose, needful action be taken. Therefore, by an order dated 10.4.1998, permission was granted by the President that an amount of Rs.5000/- be taken advance from Jetpur octroi naka and the bills of expenditures were directed to be prepared and submitted and the amount be credited towards advance account. One Jagdish Savalia was the driver and he went to the naka clerk Chhaganbhai Rathod with the order of the President and requested for an amount of Rs.5000/-. At that time, at the request of Jagdish Savalia, the petitioner had accompanied him as the matter related to his department. The petitioner also instructed the clerk to carry out orders passed by the President for payment of Rs.5000/- towards purchase of diesel for vehicles and the advance of Rs.5000/- for diesel for the vehicles of the municipality was handed over to Jagdish Savalia, driver by the octroi clerk in the night of 10.4.1998. Savalia submitted bills in that respect in the concerned office. However, under political pressure, after a period of seven months of the above incident, a show cause notice dated 26.11.1998 was issued by the respondent no. 2 Director of Municipalities, in exercise of the powers under section 37 of the Gujarat Municipalities Act (hereinafter referred to as the Act) alleging that on an inspection made on 12th April, 1998 by the Mamlatdar, an amount of Rs.5000/- was found deficit in cash of the octroi Naka and it was found that the President had taken the amount of Rs.5000/- on 10.4.1998 for which accounts had not been submitted and the petitioner was called upon as to why he should not be removed for the misconduct as a councillor. The

petitioner submitted his reply to the show cause notice before respondent no. 2 explaining that on account of five consecutive holidays, it was absolutely unavoidable to purchase diesel for the vehicles. The President had passed the order dated 10.4.1998. On the basis of that order, the amount of Rs.5000/- was advanced to the concerned employee Mr. Jagdish Savalia-driver for taking diesel in the vehicles etc. NO amount was taken by the petitioner. The bills were submitted by the driver to the department concerned. No action can be taken against the petitioner as the petitioner has not committed any act amounting to misconduct as alleged in the show cause notice. The petitioner also submitted an affidavit of the octroi clerk who had given the amount of Rs.5000/- to the driver stating that he had not paid any amount to the petitioner, but the same was paid to the driver as per the order of the President. The respondent no. 2 after considering the material on record, passed the impugned order for removing the petitioner from the office of the councillor of the municipality.

3. Heard the learned counsel for the parties and perused the relevant papers on record. No counter affidavit has been filed by any of the respondents.

4. The contention of the learned counsel for the petitioner is that the petitioner was the Chairman of the transport committee. The order was passed by the President of the Municipality to the octroi naka for giving Rs.5000/- to the driver. The petitioner being the Chairman of the Transport Committee, accompanied him to the octroi naka and hence the action has been taken only on the basis that he accompanied the driver at the relevant time to the octroi naka though bills were produced and money was accounted for. Therefore, no question of misuse of power or misconduct arises. No inquiry as contemplated under section 37 of the Act has been initiated against the petitioner though that inquiry has been directed to be conducted against the President. The petitioner was discharging his obligation as the Chairman of the Transport Committee. Therefore, in his capacity as a Chairman informed the President to do the needful to manage necessary funds for the purchase of diesel etc. for the vehicles. The action purported to have been taken as a Chairman of the Transport Committee not as in the capacity of councillor. As such, no action can be taken against the petitioner for removal from the office of a councillor. The authority has completely ignored the material on record including the evidence produced by the petitioner. The order passed by the authority is arbitrary, illegal and not sustainable in

the eye of law. There is no allegation against the petitioner that the petitioner has misappropriated the amount taken from the octroi naka. That amount has been taken by the driver of the vehicle and he has submitted the bills and accounted therefor. The petitioner cannot be held liable for any action. The action taken against the petitioner is not sustainable in the eye of law.

5. On the other hand, the learned Assistant Government Pleader submitted that the petitioner alongwith the driver had gone to the octroi naka and threatened to the naka clerk to give Rs.5000/- at 12.00 mid night. Diesel could have been taken on credit from the diesel pump or as it had been purchased in the past on credit. Certain spareparts were to be purchased from Rajkot, but in fact, those spare parts were purchased from the city and some other articles besides diesel were purchased which were not urgently required. It is significant to note here that there is no charge against the petitioner that the spare-parts were to be purchased from some other city and in fact those spare-parts were purchased from the city itself and besides diesel, other articles were also purchased which were not required. The next contention of the learned Assistant Government Pleader is that the State Government has recorded a finding of fact that the petitiner had threated and without any orders, had taken Rs.5000/- at 12.00 mid-night from the octroi clerk unauthorisedly and that amounts to miscondcut and that charge is established against the petitioner. This court has no jurisdiction to interfere with the finding of fact recorded by the authority concerned.

6. I have carefully considered the submissions made on behalf of the rival parties. From annexure "A", the application dated 10.4.1998 given by the Assistant Fitter of the Municipality to the Chief Officer of the Municipality wherein it is stated that the Nagarpalika was closed from 8.4.1998 to 12.4.198. As per the instructions of the Chief Officer and the President, jeep no. 2130 was required to be repaired and since spare-parts were not available with the local vendor, they were required to be purchased from Rajkot. Diesel and oil was also purchased against cash and due to religious holidays like Bakri Id, Mahavir Jayanti and Hanuman Jayanti etc., there was a need for diesel which was required for water tankers and other vehicles for the water supply through tankers in different areas. There would be a requirement of diesel and oil in the vehicles for the purchase of diesel, oil and spare parts and there was a need for approximately Rs.5000/- and requested for

passing an appropriate order in that regard. The President made an order on 10.4.1998 on that application taking into consideration the facts as the office of the Municipality was closed from 8.4.1998 to 12.4.1998. Permission was therefore granted that an amount of Rs.5000/- be taken advance from Jetpur naka. The bill of expenditure was duly prepared and the amount taken was credited towards advance account. It is stated that the petitioner being the Chairman of the Transport Committee, had accompanied the driver with the order of the President to the octroi naka and the amount was taken. Though it appears from the allegations made in the show cause notice that the petitioner had threatened the naka clerk for giving an amount of Rs.5000/- to the driver, but subsequently the petitioner had filed an affidavit of the Naka clerk Mr. Rathod wherein it is stated that the petitioner had accompanied the driver to the Naka and the amount was given to him. From the assertions made in the affidavit, it does not appear that any threats were administered by the petitioner to the naka clerk in that respect.

7. I have thouroughly examined the impugned order passed by the respondent no. 2 wherein it is stated that on 12.4.1998 at the time of checking of the octroi naka by the Mamlatdar and Incharge police officer, an amount of Rs.5000/- was found deficit in the funds of the octroi naka and it was stated that the petitioner and Varshaben Rakholia had taken Rs.5000/from the Chief octroi clerk. They have not presented expenditure details in that regard before Nagarpalika and a police complaint was also filed against him for this misappropriation. Moreover, the vehicle of the Nagarpalika was misused and the amount of Rs.5000/- was taken unauthorisedly from the octroi clerk. There is an unauthorised use of the vehicles. Thus, the respondent no. 2 found prima facie case against the petitioner that he has committed serious misconduct and the show cause notice dated 26th November, 1998 was issued to the petitioner. The petitioner had also filed reply wherein it was stated that the notice was illegal and deserved to be cancelled. As the office of Nagarpalika had remained closed, the Nagarpalika jeep was required to be repaired and there was a requirement of diesel, therefore, there was a need of Rs.5000/- for the purpose of diesel and essential services. Under the orders of the President, the said amount was taken as advance from the octroi clerk. That amount was not taken for personal expenses. The petitioner had gone with the driver to the octroi clerk on the personal representation by the petitioner and the orders of the President, the clerk had given the

amount of Rs.5000/- to the driver. The affidavit of Chhaganbhai Rathod, the octroi clerk was also submitted alongwith the reply wherein it is stated that the petitioner has not committed any misconduct as member of the Nagarpalika. In the larger interest of the public interest, whatever needful act was required, that has been done in discharge of the duty. The respondent no. 2 has considered the representation of the Collector, Rajkot; Mamlatdar and Chief Officer's report and other documents including written reply filed by the Chief Officer and the representation of Bhupatray Dhupelia on behalf of the Municipality and written reply of the defendant. The driver had handed over the letter bearing signature of Varshaben Rakholia, the President to the octroi clerk wherein it was stated to hand over Rs.5000/-. The petitioner had taken away Rs.5000/- by administering threats to the octroi clerk. This was the statement of Chhaganbhai Rathod before Mamlatdar and Incharge Chief Officer on 13.4.1998. In that respect, a police complaint was filed regarding misappropriation of Rs.5000/- against the petitioner. Only on the basis of the said statement made before Mamlatdar and Incharge Chief Officer on 13.4.1998, the respondent no. 2 came to the conclusion that the petitioner had threatened and without any orders had taken away Rs.5000/- at 12.00 mid-night from the octroi clerk unauthorisedly. The alleged misconduct shown in the show cause notice was shown to have been proved. Hence, there were sufficient reasons to remove the petitioner from the post of councillor and the impugned order was passed.

8. It appears that the respondent no. 2 has come to the conclusion that the petitioner has threatened and taken an amount of Rs.5000/- without any orders and has come to the conclusion regarding misconduct. But from the order of the President, it appears that the naka clerk had already been directed by the President of the Municipality that the order was with the driver at the relevant time when the petitioner was accompanying him. As such, it cannot be said that the petitioner had taken that amount without any orders. Prima facie, this finding recorded by the respondent no. 2 is erroneous on the face of the record. So far as threatening part is concerned, when the petitioner had accompanied the driver, the petitioner was in the position of the Chairman of the Transport Committee and with the order of the President of the Municipality and so there is no question of administering threats to the Naka clerk. The statement made by the Naka clerk before Mamlatdar has been resciled lateron and the material on record clearly shows that the petitione had not threatened, but it can

be said that the petitioner might have asked the octroi clerk to give that amount. Asking of that amount does not amount to any threats. Moreover, asking the Naka clerk to hand over the amount of Rs.5000/- under the orders of the President and more particularly when that amount was handed over to the driver, it cannot be treated as misconduct. In this respect, this Court in the case of Naranbhai Veljibhai Chaudhary vs. R.S.Vaghela and others reported in 1997(1) GLR, 599 has relied on the observations made in the case of Thakor Bhagabhai vs. D.D.O., Surat and another reported in 1980 GLR, 966 which reads as under:

" Therefore, the observations which have been made by the Hon'ble Mr. Justice B.K.Mehta in Thakorbhai Bhagabhai (supra) to the effect that it cannot be said that the alleged offences under sections 323, 324, 149, 147 of IPC and section 135 of the Bombay Police Act were offences involving moral turpitude in the sense that the alleged acts cannot be said to be a conduct which is contrary to honestly, good morals or unethical since at the most it was on incident of some scuffle between the petitioner and other persons alleged to be involved in the incident, are tobe read in context of the facts of that case and did not lay down a strait-jacket formula that irrespective of the manner in which these offences are committed or against whom they are committed and the circumstances under which they are committed, i.e. even without reference to the facts of the case they should be treated as offences involving moral turpitude."

This Court in the case of Kamlaben Rohitbhai Patel vs. Additional Development Commissioner, Gandhinagar and others reported in 2001(10) GLH, 109 has observed as under:

"11. For the purpose of removing a Sarpanch from holding the elective office, the officers who are charged with the statutory duties under the Act cannot act in such a cursory manner with casual approach so as to curtail or truncate the tenure of the holder of an elective office. The elected representatives for the purpose of removal cannot be treated like Government servants whose services are controlled at the pleasure of the President or Governor under Article 310 of the Constitution. The officer charged with the power for removal under section 57 does not enjoy any

such pleasure. The pleasure doctrine is alien in case of elected representatives. If the elected persons are allowed to be removed on such jejune grounds, it would simply mean throttling down the principles of democracy in the local self bodies and the elected representatives of the people like the petitioner would be made to lose their tenure at the altar of the arbitrary exercise of powers by the officers who have been charged with the duly under the Act to at least address themselves to the real object behind such provision besides the grounds and procedure. While such powers are given to the functionaries of the State under the statute, the officders are charged with a very important duty of determining the rights of the elected persons and such rights cannot be lightly interfered with merely on the basis of the procedural errors in carrying out the development projects for which no single individual like the petitioner could be held responsible simply because she held the office of Sarpanch. ..."

9. Considering the entire facts and circumstances of the case, it does not appear that the order passed by the State Government is justified inasmuch as the amount was required to be taken from the Naka on account of five consecutive holidays in the municipality office. The order was issued by the President of the Municipality. Though the petitioner being the Chairman of the Transport committee, accompanied the driver to the Octroi naka and the order was given to the octroi naka clerk and the amount was given to the driver. From the facts and circumstances, therefore, it does not appear that the petitioner has administered threats to the Naka clerk for taking Rs.5000/- from him and giving to the driver and as there was an order of the President of the Municipality, it cannot be said that the petitioner had unauthorisedly asked the Naka clerk to hand over the amount to the driver. Though this Court is not expected to appreciate the material on record, but when there is a prima face error apparent on the face of the record, this Court should interfere. In the present case, the respondent no. 2 has presumed that the petitioner has taken the amount of Rs.5000/- from the Naka clerk without any orders. That finding is apparently not tenable in view of the fact that the order of the President of the Municipality was also placed and was given to the Naka clerk to hand over the amount of Rs.5000/- to the driver. However, that amount has been given under the orders of

the President and so it cannot be said that the petitioner has taken that amount unauthorisedly and without any orders. So far as threatening part is concerned, it is not anywhere made clear by the authority as to in what manner threats were administered by the petitioner to the Naka clerk. It might be that the petitioner might have asked the Naka clerk to hand over the amount of Rs.5000/- to the driver under the orders of the President. In my view, that does not amount to administering threats. As such, the orders passed by the respondent no. 2 are not sustainable. It also appears from the order itself that a show cause notice was issued against the President also and from the other order passed by the respondent no.2 , it appears that proceedings were taken against the President, wherein it is stated that the President functioning as a member had withdrawn Rs.5000/- from the Nagarpalika unauthorisedly and had caused financial loss. The Regional Director of Municipalities, Rajkot has been ordered to make an inquiry and complete the proceedings within two months from the date of the order dated 13.1.1999. If the inquiry can be contemplated under section 37 of the Act against the President, that inquiry could also have been made against the petitioner. But no such inquiry has been ordered or conducted in the present case. Even there is no allegation either against the petitioner or against the President or an employee of the Municipality that the amount taken from the octroi naka was misappropriated in any manner. Moreover, on the other hand, it seems that the driver has furnished thebill of that amount and also accounted for. Thus, in light of the observations made by this Court in the case of Kamlaben Rohnitbhai Patel (Supra), the petitioner cannot be held liable for misconduct and the orders passed by the respondent no. 2 therefore, deserve to be quashed and set aside.

10. In view of the above discussion, this petition deserves to be allowed and is hereby accordingly allowed. The impugned order dated 13.1.1999 passed by the respondent no. 2 Director of Municipalities, State of Gujarat, Ahmedabad is hereby quashed and set aside. Rule is made absolute with no order as to costs.

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